Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-729

THE STOUFFER CORPORATION,
d/b/a STOUFFER'S CINCINNATI INN,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

HOTEL, MOTEL, RESTAURANT EMPLOYEES AND BARTENDERS UNION, LOCAL 12 OF THE HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO,
Respondent.

BRIEF IN OPPOSITION TO GRANT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BRIEF IN OPPOSITION TO GRANT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent Hotel, Motel, Restaurant Employees and Bartenders Union, Local 12 of the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, (hereinafter "Union"), hereby files its opposition to granting the writ of certiorari in the above-captioned matter.

QUESTIONS PRESENTED

1. Whether a party to a representation proceeding under the National Labor Relations Act whose claim that it is the joint employer of the employees involved in such proceeding is rejected by the Board, may obtain direct review of that factual finding in the federal appellate courts?

2. Whether Section 10 of the Administrative Procedure Act (5 U.S.C. Sec. 701-706) alone, or in conjunction with Section 10 (f) of the National Labor Relations Act, creates a right of review in the federal appellate courts of factual determinations of the National Labor Relations Board in representation proceedings?

3. Whether a party to a representation proceeding under the National Labor Relations Act whose claim that it is the joint employer of the employees involved in such proceeding is rejected by the Board, has a constitutional right to direct review of that factual finding in the federal appellate courts?

COUNTER-STATEMENT OF THE CASE

On November 19, 1975, Hotel, Motel, Restaurant Employees and Bartenders Union, Local 12 of the Hotel and Restaurant Employees and Bartenders International Union (herein the "Union") filed a petition for a representation election with the National Labor Relations Board (herein the "Board"). The petition sought an election among the employees of Cincinnati SI Company (herein "CSI") a limited partnership owning and operating Stouffer's Cincinnati Inn, Cincinnati, Ohio, a large downtown hotel, pursuant to a license agreement with the Stouffer Corporation (herein "Petitioner"). Petitioner has no ownership interest in CSI nor are any of the partners in CSI officers

or shareholders of Petitioner. CSI owns the hotel property and operates all facets of the hotel except the restaurant facilities which are operated by Petitioner under a lease with CSI. Petitioner also provides the food and beverage service at all banquet functions. The Union did not include within its petition any of the employees of Petitioner, only employees of CSI.[1]

At the representation hearing conducted by the Board, Petitioner was granted leave to intervene and participate in the proceeding. During the course of the hearing, Petitioner sought to sustain two positions, namely that it was the joint employer (with CSI) of the CSI employees the Union was petitioning for, and that the only appropriate unit for an election was one encompassing the employees of CSI as well as those of Petitioner employed at the hotel. The Board rejected both contentions finding that Petitioner was not a joint employer of the CSI employees and that a less than hotelwide unit limited to CSI employees was appropriate, both as urged by the Union. *Contrary to Petitioner's assertion on page 5, (first full paragraph) of its Petition, the Board did not base its determination of the appropriate unit solely upon the finding that Petitioner and CSI were not joint employers of the CSI employees.* The Board clearly based its determination on two other factors, i.e. "that the employees sought by Petitioner [Union] share a community of interest, and that there is no existing and well-defined area practice to the contrary."[2] (Pet. Appendix A-15, 16)

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[1] The unit petitioned for included set-up employees, bellmen, doormen, garage employees, parking attendants, maids, housemen, laundry employees, linen room employees, elevator operators, painter and maintenance employees.

[2] There was no existing and well-defined area practice of certifying only hotelwide units.

On October 8, 1976, the Board in accord with its Decision and Direction of Election of September 8, conducted an election among the CSI employees in the unit found appropriate by the Board. The Union won the election and was thereafter certified as the bargaining agent of the CSI employees. CSI and the Union then entered into a collective bargaining agreement effective December 5, 1976 through December 4, 1979 covering the CSI employees. No employees of Petitioner are covered by that agreement.

As Petitioner notes, CSI did not refuse to bargain with the Union and thereby precipitate unfair labor practice charges with the attendant review procedure available under Sections 10(e) and (f) of the National Labor Relations Act (herein the "Act"). Instead, CSI accepted the Board's findings and complied with the obligations imposed upon it by the certification. Despite this latter fact, Petitioner nevertheless sought direct review of the Board's decision through a Petition for Review filed in the Court of Appeals on February 14, 1977, some five months after the Board decision issued and more than two months after CSI and the Union entered into their collective bargaining agreement.

The Court of Appeals dismissed the Petition for Review on July 15, 1977 and denied Petitioner's request for a rehearing en banc on August 24, 1977.

ARGUMENT AGAINST GRANTING THE WRIT

A. Petitioner has no right of review of the Board's Decision and Direction of Election under Section 10(f) of the Act.

1. There is no basis for direct review under Section 10(f) of a Board ruling in a representation proceeding.

Petitioner seeks direct review under Section 10 (f) of the Act of the Board's decision in a representation proceeding. That direct review of Board action in such a proceeding is unavailable was decided by this Court some thirty-eight years ago in *AFL* v. *NLRB,* 308 U.S. 401 (1940). That decision remains undisturbed to this date. In that case the court concluded after thorough review of the purpose and scheme of the Act including the underlying legislative history that Board decisions in certification matters[3] are not reviewable by federal appellate courts, except incident to review of a Board order in an unfair labor practice proceeding.

The only provision of the National Labor Relations Act providing review by aggrieved parties of final Board orders is Section 10 (f). The phrase "a final order of the Board" contained in that section refers exclusively to orders of the Board granting or denying the relief sought in unfair labor practice proceedings, not representation proceedings. *Laundry Workers Union* v. *NLRB,* 197 F.2d 701, 703 (CA 5, 1952). See *AFL* v. *NLRB,* supra; *Boire* v. *Greyhound Corp.,* 376 U.S. 423, 476-477 (1964), *Eastern Greyhound*

[3] A Decision and Direction of Election, involved here, is merely a step in the representation process leading to certification and is likewise nonreviewable. *NLRB* v. *International Brotherhood of Electrical Workers,* 403 U.S. 413 (1940).

Lines v. *Fusco,* 323 F.2d 477, 479 (CA 6, 1963); *Local 542, Operating Engineers* v. *NLRB,* 328 F.2d 850, 853-854 (CA 3, 1964) cert. denied 379 U.S. 826. Similarly, the courts have consistently held that Board rulings in representation proceedings under Section 9 of the Act are non-adversary in character and do not result in judicially reviewable final orders. *AFL* v. *NLRB,* supra; *Boire* v. *Greyhound Corp.,* supra; *Modern Plastics* v. *McCulloch,* 400 F.2d 14, 19 (CA 6, 1968); *Cameron* v. *NLRB,* 207 F.2d 775 (CA 6, 1953); *Timken Detroit Axle Co.* v. *NLRB,* 197 F.2d 512, 513 (CA 6, 1952); *Eastern Greyhound Lines* v. *Fusco,* supra, 479; *NLRB* v. *Auto Crane Company,* 536 F.2d 310 (CA 10, 1975); *NLRB* v. *Saunders Leasing System, Inc.,* 497 F.2d 453 (CA 8, 1974); *Bishop* v. *NLRB,* 502 F.2d 1024 (CA 5, 1974); *A.G.M. Workers Association* v. *NLRB,* 117 F.2d 209 (CA 10, 1940).

The legislative history of the Wagner Act as well as the Taft-Hartley amendments to that Act clearly demonstrate Congress' unmistakable intention to preclude any such direct review of representation determinations. That very question was extensively debated when both Acts were being considered, and on both occasions Congress, "concluded that, unless drastically limited, time-consuming court procedures would seriously threaten to frustrate the basic national policy of preventing industrial strife and achieving industrial peace by promoting collective bargaining." *Leedom* v. *Kyne,* 358 U.S. 184 (1958), (in particular, dissenting opinion of Justice Brennan, page 191); *AFL* v. *NLRB,* supra, 409-411; *Boire* v. *Greyhound Corp.,* supra.

Petitioner asserts that there is an unanticipated "gap" in the statute because parties like Petitioner, who claim to be joint employers of employees involved in representation proceedings may be denied review of Board determinations

in such proceedings where, as here, such claimed joint employer status is rejected by the Board. Assuming arguendo that such a "gap" does exist this Court succintly stated in *AFL* v. *NLRB,* supra, in response to a similar argument advanced by petitioners in that case,

> ". . . It seems to be thought that this failure to provide for a court review is productive of peculiar hardships, which were perhaps not foreseen in cases where the interests of rival unions are affected. But these are arguments to be addressed to Congress and not the courts. . . ."

Unions have frequently urged, for example, that dismissals of representation petitions should be reviewable or that representation elections should be enjoined pending review of issues raised in such proceedings. Citing *AFL* v. *NLRB,* supra, courts have consistently rejected such arguments. See, e.g., *A.G.M. Workers Association* v. *NLRB,* 117 F.2d 209 (CA 7, 1940); *International Union of Operating Engineers Local 148* v. *International Union of Operating Engineers Local 2,* 173 F.2d 557 (CA 8, 1949).

Petitioner's assertion that such a "gap" exists further demonstrates a clear misconception not only of the nature of the representation process but of the underlying policy of the Act. In contrast to an unfair labor practice proceeding which is a quasi-criminal, adversary proceeding where parties may be subject to remedial sanctions, a representation proceeding is essentially non-adversary, fact-finding in character where the Board is seeking to ascertain the desires of the employees as to their representation. *NLRB* v. *Fresh'nd Aire Co.,* 226 F.2d 737 (CA 7, 1955). Once jurisdiction is established, the mandate imposed on the Board by Section 9 of the Act is to determine the appropriate unit and to ascertain the desires of a majority of the affected employees. The overriding policy of Section 9 of the Act is in favor of the interest of employees to be

represented by representatives of their own choosing for the purpose of collective bargaining. *NLRB* v. *Western Southern Life Insurance Co.*, 391 F.2d 119 (CA 3, 1968) cert. denied 393 U.S. 978; *NLRB* v. *Sun Ship-Building and Dry Dock Co.*, 135 F.2d 15 (CA 3, 1943). Incidental to the task of achieving that purpose are a variety of factual determinations committed to the Board's discretion (and expertise) such as employer status (including joint employer status), supervisory status, guard status and other appropriate unit issues. In *Boire* v. *Greyhound Corp.*, supra, an employer found to be a joint employer by the Board sought review of that decision in the district court on the basis, inter alia, that the *Leedom* v. *Kyne*, supra, exception was applicable. This Court rejected that argument holding that unlike the question in *Kyne* joint employer status was essentially a factual issue, not dependent solely upon construction of the statute for resolution. The same principle was recognized in *Bays* v. *Miller*, 524 F.2d 631 (CA 9, 1975). There, petitioner sought to challenge a determination by the Board in a representation matter that truck owner-operators were employees, not independent contractors, subject to the Act. The Court discussed, in detail, the "basic presumption of the availability of judicial review" urged by petitioners here, but concluded that although "[A] person found to be an employee, however, as these owner-operators were, has no recourse. . . ", the overriding congressional purpose to avoid delay would be thwarted if review of such determinations were permitted. The Court observed,

> ". . . On the other hand, where the Board finds that a party does not fall within the independent contractor exemption from the definition of "employee" it has complied with at least the form of the statute. *To permit an employee to go behind this formal correctness and challenge the merits of the Board's finding*

> *even by application of a narrow 'abuse of discretion' standard, would require the Court to make a time-consuming analysis of the Board's factual findings and legal conclusions. The availability of such challenges would allow the dilatory maneauvers which Congress chose to prevent.*" (emphasis supplied)

The principle recognized in *Boire* and *Bays* v. *Miller*, is that in formulating a procedure for insuring expeditious determinations in representation matters Congress necessarily was required to balance the interests of employees against those of employers as well as competing unions. As the scheme of the Act clearly shows, Congress ultimately chose to give preference to the representation rights of employees over the review rights of employers and other parties – and in some instances, as here, to exclude such review rights. However, as will be discussed hereinafter, in those latter instances the primary policy of the Act is preserved with only limited and incidental, if any, effects on the aggrieved party as a result of the nonreviewability of such "factual determinations."

2. Petitioner is not aggrieved by the Board's determination that it is not a joint employer of the employees involved in the representation proceeding.

Consistent with the espoused congressional purpose, the review procedures under Section 10 (f) ultimately enable an employer subject to the bargaining obligations arising as a result of a certification in a representation proceeding to seek review of adverse Board determinations in that proceeding. Petitioner claims that the Board's adverse "employer" finding denying it "employer" status under the Act deprived it of "rights" under the Act to which it is entitled.

A closer examination of that claim reveals that it is totally without merit.

The effect of the Board's decision is to impose an obligation on CSI (to recognize and bargain with respondent Union) and to establish a legal relationship between CSI and the Union (as bargaining agent for CSI's employees). That decision, however, left Petitioner in the identical position it was in *prior* to the representation proceeding. It acquired no obligations to the Union as a result of the Board's finding, it was denied no rights, nor was any legal relationship between it and the Union created. All that transpired was that the CSI employees consistent with the purposes of the Act were given an opportunity to designate a representative of their own choosing with whom their employer (CSI) is obligated to bargain. Petitioner, in contrast, is not obligated to recognize the Union, has no employees represented by the Union, and in fact, can point to no rights belonging to it that were denied. Consequently, it is patently clear that the Board's factual determination that Petitioner is not a joint employer of the employees involved was not a "final" reviewable order as that term is customarily interpreted. Such an order is final only if it (1) imposes an obligation, (2) denies a right, or (3) fixes some legal relationship as a consummation of the administrative process. *Cities Service Gas Co.* v. *Federal Power Commission,* 255 F.2d 860 (CA 10, 1958) cert. denied 358 U.S. 837. Whether an action is final depends not on the label affixed but on a realistic appraisal of the consequences of the action. *Isenbrandtsen Co.* v. *U.S.,* 211 F.2d 51 (CA D.C. 1954) cert. den. 347 U.S. 990.

Petitioner claims that it "has been denied all rights to effectively set standards for and directly affect the employment conditions of employees it 'maintains' are its employees" (emphasis ours) and that its "legal relationships

with CSI have been prejudicially altered" by the Board's factual determination that Petitioner is not a joint employer of the employees of CSI. That claim is tenuous, at best. Petitioner's legal relationship with CSI is derived solely from a license agreement under which Petitioner exercises certain contractual rights of control over various aspects of CSI's operation of the hotel. Based on the fully developed record including a thorough review of the license agreement, the Board rejected Petitioner's claim of employer status. Although it is true that Petitioner, as a result, did not acquire "employer" status under the Act, its contractual rights under its license agreement with CSI remain in tact. The Board's determination in no way can alter that contractual relationship. In essence, what Petitioner claims is that its contractual relationship with CSI under the license agreement entitles it to statutory rights under the Act. That claim simply has no merit whatsoever, and again, is bottomed on factual determinations Congress intended should be left to the Board. *Boire* v. *Greyhound,* supra, *Bays* v. *Miller,* supra. Denial to Petitioner of direct review of that factual determination is both consistent with the overall scheme of the Act and the congressional intent to grant review only to parties obligated by Board action in representation proceedings and subject to unfair labor practice remedies for failure to honor those obligations. As explained above, Petitioner is not subject to the obligations imposed as a result of the Board's certification nor can it be ordered to do anything with respect to the employees or their bargaining representative covered by that certification. Under those circumstances, a right of review is clearly unnecessary and, in fact, would be meaningless.

B. Section 10 of the Administrative Procedure Act does not alone, or in conjunction with Section 10(f) of the National Labor Relations Act, create a right of review in the federal appellate courts.

Although admitting that Section 10 (f) of the Act does not create a right of review in the federal appellate courts under the circumstances present here, Petitioner asks the question: Whether Section 10 of the APA can be read to "make operative" (as opposed to "imply" or "create") or cure the claimed "gap" in the review rights under the NLRB. Respondent believes that Petitioner's assertion here is nothing more than a play on words. If, as this Court has held, Section 10 (f) does not authorize direct review of Board determinations in representation proceedings, then Petitioner's argument must fail, unless Section 10 of the APA is found to create (independent of Section 10 (f)) such a right. That question has already been answered by this Court in the negative. In *Califano* v. *Sanders,* —— U.S. ——, 51 L.ed. 2d 192 (1977) this Court held specifically that the APA could not be construed as containing an independent grant of subject matter jurisdiction. The statute itself provides that it shall apply "according to the provisions thereof, except to the extent that — (1) statutes preclude judicial review" (Section 701 (a) (1)); and was never intended to expand the right of review. See e.g. *Caulfield* v. *U.S. Department of Agriculture,* 293 F.2d 217 (CA 5, 1961) cert. denied 369 U.S. 858. Moreover, where a statute "as judicially interpreted" precludes review such review is not available under Section 10. *Kirkland* v. *Atlantic Coastline R. Co.,* 167 F.2d 529 (CA D.C. 1948) cert. denied 335 U.S. 843. See also *Airline Dispatcher's Assn.* v. *National Mediation Board,* 189 F.2d 685 (CA D.C. 1951) cert. denied 342 U.S. 849. In

that connection the Court will note that beginning with the decision in *AFL* v. *NLRB,* supra, those courts that have interpreted Section 9 of the NLRA have not deviated from the conclusion that Congress, in fact, intended to preclude judicial review of representation proceedings except as an incident to review of an order in an unfair labor practice proceeding. In *Fitzgerald* v. *Douds,* 167 F.2d 714 (CA 2, 1948), for example, the court stated,

> "The Act nowhere authorizes a direct review of a representation order, or of a 'decertification' order under the Act as amended. It does, however, provide an indirect review in section 9 (d) which directs that when an order under section 10 (c) prohibiting an unfair labor practice has been based in part upon a certification following an invetigation pursuant to section 9 (c) and is to be enforced or reviewed under section 10 (e) or 10 (f) the record of the certification and investigation shall be included in the transcript. *A majority of the court believes that Congress has dealt in section 9(d) with reviews of certification and 'decertification' and has provided therein the only relief it means to grant on that subject."* (emphasis supplied)

Still another infirmity in Petitioner's theory is its claim that the APA authorizes review in the federal appellate courts, as opposed to the district courts. Section 703 of the APA provides,

> "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action. . . . in a court of competent jurisdiction . . ."

The latter portion of that section has been uniformly interpreted to apply only to original actions in the district courts, the courts of appeals having only such jurisdiction as

is specifically authorized by statutory grant of authority. *School Board of Broward County* v. *Department of H.E.W.*, 475 F.2d 1117 (CA 5, 1973); *AFL* v. *NLRB*, supra, page 403. Thus, even assuming arguendo that the APA authorizes review in this instance such review would necessarily be confined to an original action in the district court – and, to date, review in such courts has been judicially limited to three distinct areas, i.e. where the Board's order contravenes a specific prohibition of the Act. *Leedom* v. *Kyne*, supra; where Board action creates international problems for the government, *McCulloch* v. *Sociedad Nacional De Marineros*, 372 U.S. 10 (1962); and where a party is deprived of due process by the Board, *Fay* v. *Louds*, 172 F.2d 720 (CA 2, 1949).[4] None of those exceptions is present in this case, nor does Petitioner claim that any are applicable. It attempts only to draw an analogy between the extraordinary circumstances admittedly present in such cases and the claimed extraordinary circumstances here, an analogy that is totally unwarranted.

C. Review of the Board's factual findings in this instance is not constitutionally mandated.

Petitioner urges that judicial review is "consttutionally mandated" by decisions of this Court and tha its "due process rights to review" have been "foreclosed by unanticipated circumstances." Even in the broalest sense that assertion is incorrect. Except where the Constitution requires it, judicial review may be granted or withheld as Congress chooses. *Estep* v. *U.S.*, 327 U.S. 11l (1945); *Carlson* v. *Landon*, 342 U.S. 524 (1951); *FongYue Ting* v *U.S.*, 149 U.S. 698 (1892); nor are appeals alowed as a

[4] Not to be confused with Petitioner's claim that a right of review is constitutionally mandated (covered herein under sub-heading C).

matter of right. *Pote (Station W.L.O.E.)* v. *Federal Radio Commission*, 67 F.2d 509, (CA D.C., 1933) cert. denied 290 U.S. 680. It is equally well-established that the right of review is not an essential element of due process of law. *Reetz* v. *Michigan*, 188 U.S. 505 (1902); *AFL* v. *NLRB*, supra.

In attempting to distinguish this Court's decision in *Califano* v. *Sanders*, supra, Petitioner compares its asserted constitutional claims with those distinguished in *Califano*. In *Califano* this Court cited *Weinberger* v. *Salfi*, 422 U.S. 749 (1974) and *Matthews* v. *Eldridge*, 424 U.S. 319 (1975), as examples of cases where actions of administrative agencies, as such, were claimed to have violated parties' constitutional rights. Such cases are clearly distinguishable from Petitioner's claim in this instance, i.e. Petitioner does not claim that the Board's determination that it is not a joint employer violates Petitioner's constitutional rights – only that its right of review of that finding cannot be constitutionally denied.

Petitioner further claims that the decisions of this Court as well as decisions of other courts of appeals[5] emphasize "the constitutional requirement that review not be foreclosed where not otherwise available under the statutory scheme." Petitioner ignores, however, the obvious fact that such a requirement[6] is not applicable where the statute clearly *precludes* such review, i.e. where Congress elects unmistakably to deny review it is not the function of the courts to provide it.

The *Squillicote* case likewise lends no support to Petitioner's position. Appellants in that case challenged, inter

[5] Citing *Squillicote* v. *Teamsters Local 344*, —— F.2d —— (C.A. 7, (1977)), 95 LRRM 2977 at 2982-2983.

[6] Respondent questions in the first instance whether any such "requirement" exists.

alia, the constitutionality of Section 9 (b) (3) of the NLRA[7] in the district court. The issue was, in essence, appellant's right to raise a constitutional issue directly in the district court as opposed to reserving that issue for review under Section 10 of the Act. The Seventh Circuit's resolution of that issue in no way supports Petitioner's "constitutional" argument here, nor did that court as claimed by Petitioner treat with the subject of a constitutional right of review raised by Petitioner.

D. The delay considerations underlying the congressional purpose to restrict judicial review of representation proceedings are unquestionably involved here.

Petitioner asserts that the policy considerations against delay are not present here. That assertion is patently incorrect. The reasons advanced by Congress during the debates on both the Wagner and Taft-Hartley Acts for restricting review in such cases are equally applicable to the circumstances of this case. In fact, there is less justification for such direct review as is sought here than in the usual situation where a Board certification subjects a party to immediate legal consequences under the statute. In this instance were direct review permitted, we would have the anomolous result that a party found to be the sole employer of the employees (who could seek review of the Board's action *only* by refusing to bargain and thereby invoking the indirect review procedure under Section 10 (f)) elected to forego such review and to bargain with the certified representative of his employees, while a party found

[7] Section 9(b) (3) prohibits the Board from certifying a union as the representative of a unit of guards where that union admits to membership employees other than guards.

by the Board not to be an "employer" of such employees could delay the desired ultimate end to which the representation procedure is directed (preventing industrial strife through collective bargaining) by seeking direct review of the Board's factual determinations. Moreover, unless the designated employer and the Union opted to await the outcome of such review, a chaotic situation as exemplified by this very case would result. Here, the Board election occurred on October 8, 1976 and the Union was certified as the bargaining representative on October 18, 1976. It entered into a contract with CSI on December 28, 1976. Petitioner did not file its Petition for Review until February 11, 1977. Thus, if a right of review exists in this case, conceivably CSI and the Union could be well into the second full year of the collective agreement before a final decision was made by this Court. Assuming arguendo that Petitioner was successful on its petition the collective bargaining relationship between CSI and the Union would be totally disrupted, the collective agreement could be invalidated and the membership dues paid to the Union pursuant to the union security and check-off provisions conceivably would have to be repaid. Instead of furthering the policies of the Act in preventing industrial strife and fostering peaceful collective bargaining as an alternative to such strife, review under these circumstances would inordinately delay resolution of representation matters and have just the opposite effect.

E. Petitioner misapplied this Court's decision in Prairie Construction Co. v. Operating Engineers, 425 U.S. 800 (1976).

Petitioner argues that the Board in this case failed to make the appropriate unit determination required by Section 9 (b) of the Act. That assertion is clearly incorrect. The Board unquestionably made the required unit determination, (Pet. Appendix A-15, 16) rejecting CSI's position that a unit less than hotel-wide in scope was contrary to area practice and specifically *finding that the area practice was not clearly defined and that the employees of CSI sought by Respondent union shared a community of interest.* Those two factors were in addition to the finding that CSI and Petitioner were not joint employers and absent the latter finding, would clearly still support the Board's unit determination.

This Court in *Prairie Construction Co.* v. *Operating Engineers,* supra, admittedly referred to the Board's obligation to make a unit determination pursuant to Section 9 (b) but Respondent is at a loss to determine the applicability of the issue in that case to those raised here. Assuming arguendo that the holding in *Prairie* was that the Board could not resolve the unit issue solely on the basis of its determination as to the employer entity, which it was not, that decision would not apply here in light of the Board's unmistakable unit determination in this instance based, as it was, on factors other than the scope of the employer entity.

CONCLUSION

For the foregoing reasons it is respectfully urged that the petition for writ of certiorari should be denied.

Respectfully submitted,

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